

Reply Comments of
National Railroad Passenger Corporation
(Amtrak)

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Concerning
Amtrak Emergency Routing Orders
Docket No. EP 697

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The National Railroad Passenger Corporation ("Amtrak") submits these reply comments regarding the Notice of Proposed Rulemaking ("NPRM") issued by the Surface Transportation Board ("Board"), which sets forth new proposed rules regarding Amtrak emergency routing orders (the "Proposed Rule"). See 76 Fed. Reg. 766 (January 6, 2011). This reply addresses the comments filed by the American Association of Railroads ("AAR")¹ and The Kansas City Southern Railway Company ("KCSR").

Neither the AAR's nor KCSR's comments identify any specific way in which the procedures that have been in place for many decades for granting Amtrak applications for emergency relief have resulted in unsafe conditions or other hardships for the affected carriers. Nonetheless, AAR and KCSR suggest that the proposed rule mandate not only the procedure for seeking and granting emergency relief, but also substantive terms that must be included in Board orders. AAR and KCSR also request revisions to the proposed timelines for seeking and granting emergency orders which could significantly prejudice Amtrak's rights under 49 U.S.C. § 24308. Amtrak's comments, on the contrary, seek neither to enlarge nor diminish these statutory rights, but instead seek to maintain Amtrak's statutory rights exactly as they have been administered by the Board for many years.

1. The procedures adopted by the Board should not delay the issuance of an immediate emergency order in appropriate circumstances.

While the AAR does not object to the proposed rule's requirement that affected carrier replies be filed within one business day of the filing of the application, the AAR suggests that the Proposed Rule be amended to either (1) extend the time for the Board to issue its initial order from one business day to two business days, or (2) require the Board to obtain an affected carrier's view by other than written means. KCSR objects to the proposed one-business-day time frame for affected carriers to file a reply.

As Amtrak noted in its comments, 49 U.S.C. § 24308(b) provides that the Board, "on application by Amtrak, shall require a rail carrier to provide facilities *immediately* during

¹ As noted in the AAR's comments, while Amtrak is an AAR member it was not consulted about, and does not adopt, the comments submitted by the AAR.

any emergency.” The procedure that has been in place for many decades – and which Amtrak has urged be adopted in these regulations – ensures that immediate relief remains available to Amtrak when warranted by the nature of the emergency. The availability of such immediate relief has not only been critical in situations where, for example, Amtrak passengers are stranded by an emergency *en route*, but has been an important factor in encouraging the parties to reach voluntary agreement without resort to the Board.

For this reason, Amtrak objects to any time frame that would preclude the Board or its designee, in all circumstances, from issuing an immediate order while awaiting a reply from the affected carrier. In order to address the issue raised by the AAR and KCSR regarding an opportunity for input by the affected railroad, Amtrak’s comments proposed (at p. 4) that telephonic communication be used as the initial means for communication with the Board. Where practical, such telephonic communication should include a representative of the affected carrier. However, Amtrak objects to any procedure that would *require* such communication in every case, even when it is impractical or would delay the issuance of an immediate order under exigent circumstances “on application by Amtrak,” as required by the statute. Such a requirement would be particularly unwarranted because the availability of a representative of an affected carrier may be outside of Amtrak’s – and the Board’s – control.

For the same reason, Amtrak does not agree with AAR’s suggestion that the proposed rule include a provision for stays pending appeal of an initial order. In effect, an initial order granting an application for emergency relief, which is then stayed pending appeal, is tantamount to no emergency relief at all.

Finally, Amtrak should not be required, as suggested by KCSR, to serve its application on the affected railroad’s Chief Executive Officer, Chief Operating Officer, and Chief Legal Officer. KCSR does not explain why it is insufficient that Amtrak serve the contact person at the affected carrier with whom Amtrak had been dealing in an attempt to reach a consensual agreement and the affected carrier’s registered agent, as provided in the Proposed Rule. Either of those recipients are in the best position to determine which other officers of the affected carrier, if any, should be notified of the application.

2. *The Proposed Rule is procedural in nature, and should not address or prejudge the substance of an Amtrak application or STB decision on emergency routing orders.*

The NPRM states that the purpose of the Proposed Rule is to “establish[] *procedures* for Amtrak to obtain the relief authorized by the statute.” Nonetheless, both the AAR’s and KCSR’s comments ask that the Proposed Rule be revised to mandate certain *outcomes* with respect to emergency routing orders, a process which would usurp the Board’s

historic adjudicatory role in determining emergency service issues on a case-by-case basis.

For example, the AAR argues (comments at pp. 2-3) that in all cases where Amtrak applies to the Board for an emergency routing order, certain "principles" should prevail regarding the applicability of any underlying contractual agreement and operating requirements on the route. KCSR goes further (comments at pp. 5-9), and asks that the Proposed Rule include specific types of liability, insurance, compensation, and operating provisions.

Amtrak strongly urges that such substantive issues are not only irrelevant to the purpose and intent of the Proposed Rule, but that any attempt to impose the terms to be embodied in emergency service orders through this rulemaking process would be contrary to the governing statute. Under 49 U.S.C. § 24308(b), the Board is authorized to "prescribe reasonable terms" applicable to individual emergency service orders, on a case by case basis, through its adjudicatory powers, which orders are then subject to procedural safeguards such as the right of appeal. To adopt the suggestion of the AAR and KCSR that certain terms be required in any emergency service order would essentially be to prejudge the outcome of a process that the statute vested in the Board, acting as an adjudicatory body, without the presentation of any supporting facts or argument.²

While Amtrak objects as a whole to the imposition of blanket, substantive requirements or terms in STB emergency routing orders through the rulemaking procedure, two "substantive" issues raised in the comments require specific comment.

First, KCSR asserts that no Amtrak application for emergency relief should be considered unless Amtrak "provide[s] for full liability protection for the host carrier." The statute itself only provides that the "reasonable terms" that the Board must prescribe in issuing an order include "indemnification of the carrier by Amtrak against personal injury risk to which the carrier may be exposed." How this statutory requirement is interpreted should be determined by the Board if and when a dispute arises, and not in the context of a rulemaking regarding procedural issues.

² While Amtrak objects to the principle of predetermining the "reasonable terms" of specific emergency service orders under any circumstances, using the vehicle of this NPRM to do so would be particularly inappropriate, as the NRPM itself does not propose any substantive terms for inclusion in STB emergency routing orders.

Second, the AAR asserts (at pp. 2-3) that any provisions of the operating agreement between Amtrak and a temporary host railroad should be adopted in any emergency routing order issued by the Board, including the terms of any "emergency services" and liability/indemnification provisions. Amtrak does not dispute that any existing contract may, in many if not most cases, be found by all the parties, and the Board, to be the best source of the "reasonable terms" that the statute envisions. However, there is no basis in fact or in law for the Board to prejudge this issue and impose such terms on a universal basis without regard to the facts or equities of a particular situation. Amtrak submits that it would be inappropriate to use this rule-making vehicle to pre-determine the substantive "reasonable terms" that the statute has left to the Board's adjudicatory powers to determine.

Finally, it should be noted that both the AAR and KCSR comments raise potential safety concerns as a basis for requiring mandatory substantive provisions in both Amtrak's application and any Board emergency order. Amtrak agrees, as stated by the AAR (comments at p. 3), that "[s]afety is the paramount goal in all situations." However, during the many decades during which § 24308(b) has been in place and the Board has operated under its current procedures, Amtrak is not aware of any situation – and neither the AAR nor KCSR has identified any situation – in which Amtrak has sought or received an emergency routing order that violated existing FRA or other safety requirements. Amtrak anticipates that the affected parties and the Board will continue to act responsibly in requesting and issuing emergency routing orders which recognize that the safety of Amtrak passengers and others is, indeed, of paramount concern. Moreover, we must not lose sight of the fact that this process is designed to address *emergencies* that often involve railroad passengers who may be stranded for extended periods, as opposed to coal or other goods. Any procedure that imposes unnecessary delays is inconsistent with the statute, years of precedent under which the Board has granted such orders, and common sense.

2. *The Board should not use the NPRM procedure in order to "confirm" the nature of any particular emergency situation in which it will grant relief.*

KCSR asks that the Board, through the rulemaking process, "confirm" that it will interpret the term "emergency" as used in the statute to mean "an unexpected event affecting ongoing regularly-scheduled Amtrak intercity movements ... which is expected to last a few days at most." (KCSR comments at pp. 8-9)

The NPRM process which, in this case, proposes a purely procedural rule regarding emergency service orders, is not the appropriate vehicle for statutory interpretation of the kind KCSR seeks. While the majority of emergency routing order applications may involve the types of situations described by KCSR, 49 U.S.C. § 24308(b) contains no

limitations on what qualifies as an "emergency" requiring immediate relief, and the Board has historically found that provision to be a vital tool in ensuring that emergency situations do not adversely impact passenger rail service. *See* cases cited in Amtrak's original comments, filed February 7, 2011, at 5. It is for this reason that Amtrak has proposed that references in the proposed rule which suggests any limitation on the types of emergencies that may result in a routing order under § 24308(b) be replaced with more generic language, recognizing that the statute – and the STB's own precedent – does not impose the types of limitations requested by KCSR. In any event, as the Proposed Rule requires that Amtrak's application provide, among other things, "[a] description of the nature of the emergency necessitating the routing order," Proposed Rule § 1034.2(b)(1), the Board or its designee can and should determine the appropriateness of the application on a case-by-case basis, as it has done for many decades.

* * *

Like the AAR, Amtrak is hopeful that Amtrak and affected host railroads will continue to resolve emergency routing issues through mutual agreement, and that resort to the Board under the provisions of 49 U.S.C. § 24308(b) will be the exception rather than the rule. In Amtrak's experience, however, immediate emergency relief from the Board is not only required on occasion, but the availability of such relief has been a positive factor in encouraging the parties to reach agreement. In order for this important statutory right to retain its effectiveness, Amtrak therefore urges that the Proposed Rule be limited to procedural issues only, and be revised as outlined Amtrak's initial comments.

Submitted:
February 22, 2011